Zulkiflee bin SM Anwar Ulhaque & Anor v Arikrishna Apparau & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-366–08 OF 2012
ABDUL AZIZ ABD RAHIM, MOHAMAD ARIFF AND DAVID WONG JJCA
1 NOVEMBER 2013

Civil Procedure — Pleadings — Issue not pleaded — Claim for damages not pleaded — Whether fatal — Whether omnibus prayer in statement of claim for 'further or other relief' could be used to award damages

Constitutional Law — Fundamental liberties — Personel liberty — Right to make a living — Books and artistic collage seized by police from appellant on suspicion of containing seditious material — No charges preferred against appellant — Whether seizure and continued detention of books and collage unlawful — Whether appellant's constitutional right to make a living affected — Whether appellants entitled to damages — Federal Constitution art 5

Tort — Wrongful arrest — Damages — Books and artistic collage seized by police from appellant on suspicion of containing seditious material — No charges preferred against appellant — Whether seizure and continued detention of books and collage unlawful — Whether appellant's constitutional right to make a living affected by seizure and detention of books — Whether appellants entitled to damages — Federal Constitution art 5

Tort — Wrongful detention — Wrongful detention by police — False imprisonment — Damages — Arrest and detention under s 23 of the Criminal Procedure Code, s 11 of the Sedition Act 1948 and s 20 of the Printing Presses and Publications Act 1984 — Whether there was evidence for arresting officer to reasonably suspect that an offence committed — Test partly subjective and partly objective — Burden of prove on arresting officer — Arrest based on suspicion of possession of seditious publications — Further detention under order by magistrate — Whether arrest and detention unlawful because no charges preferred against arrested person

On 24 September 2010 at about 4pm a team of police officers headed by the first defendant, an Assistant Superintendent of Police had raided the plaintiffs' office premises in Brickfields, Kuala Lumpur, arrested the first plaintiff and

seized 66 books entitled '*Cartoon-O-Phobia*' ('the book') as well as an artistic collage ('collage'). The second plaintiff was the distributor of the book. According to the first plaintiff, upon his arrest he was taken to a number of police stations in Kuala Lumpur and Selangor and finally before midnight he was taken by the defendants to Balai Polis Sepang and thereafter was kept in remand at the Balai Polis KLIA that night. The following day ie on 25 September 2010, the first plaintiff was brought before a magistrate at the Sepang Magistrate's Court where he was ordered to be remanded in police custody for one day. The first plaintiff was released on 25 September 2010 after having his statement recorded by the police. The police had also raided a printing house where 10 books, documents related to print orders and printing plates were seized. The first appellant was released on 25 September 2010, only at 6.30pm in the evening after his statements were recorded. There was no other investigation carried out on first appellant other than the recording of his statements. The appellants were never charged in court after the detention and arrest in relation to the contents of the seized books. The books had also not been banned by the authorities. The High Court dismissed the appellants' claim for unlawful detention and false imprisonment. However the High Court held that the seizure and the continued detention of the books and collage was unlawful and the High Court ordered that damages be assessed against the respondents for the unlawful seizure and continued detention of the said books and collage. The appellant appealed against the dismissal of the appellant's claim for unlawful detention and false imprisonment and the respondents cross-appealed against the damages awarded for unlawful seizure and continued detention of the books and collage.

Held, dismissing the appeal and the cross-appeal:

(1) The defendant relied on s 23 of the Criminal Procedure Code ('CPC'), s 11 of the Sedition Act 1948 ('Act 15') and s 20 of the Printing Presses and Publications Act 1984 ('Act 301'). In all the three provisions the expressions 'reasonable suspicion', 'reasonably suspected of unlawful possession' and 'reasonably suspected of committing … any offense' are used. These expressions show that the arresting officer must form an opinion to satisfy himself or herself that there is evidence for him or her to reasonably suspect that an offence had been committed and it is committed by the appellants. The burden to prove that the arrest was lawful and that the evidence on which the arrest was grounded had satisfied the test of reasonable suspicion rested entirely on the first respondent (see para 17).

(2) There was nothing wrong with the arresting officer ie the first respondent forming his opinion that the contents were seditious by flipping through the pages of the book *Cartoon-O-Phobia* and by looking at the collage. The conclusion whether there exists reasonable grounds for the suspicion to justify the arrest and detention is partly subjective and partly objective.

The subjective part is that the arresting officer must have formed a genuine suspicion at the time of making the arrest that the person being arrested is committing the offence under the relevant Acts. The objective part is that the arresting officer must show or must have reasonable grounds for forming such suspicion (see paras 18–19).

(3) The first respondent was justified in his opinion that there was reasonable suspicion that the first appellant had contravened the provision of Act 15, notwithstanding that the relevant authority had not banned the book or declared it as prohibited publication or that no charge for any offence under either Act 15 or Act 301 had been preferred against the first appellant (see para 34).

(4) There was no cogent evidence to indicate that DW2 had taken the first appellant for a ride to various police stations merely to thwart the launch of the first appellant's books on the same day of his arrest. The fact that no charges were ever preferred against the first appellant in respect of the arrest and the publication of the books was insufficient evidence to suggest that there was malice in the conduct of the defendants. The first appellant was first detained on reasonable suspicion of committing a crime and he was subsequently further detained under a valid order by a magistrate pursuant to s 117 of the CPC. Therefore, the first appellant's detention and further detention was lawful (see paras 50–52).

(5) The first appellant was a cartoonist of repute. His artistic works were offered for sale to the public and he made a living out of it. Until the date of the hearing of this appeal no action was taken by the relevant authorities to ban the books that were seized from the appellants' premises; and the first appellant had not been charged for the alleged offence. Surely within two years to the date of the trial at the High Court, the relevant authorities would have formed an opinion whether to proceed with charging the first appellant in court for the alleged offence or at the very least to ban the books for sale to the public if they found the materials were offending in any way according to law. But this did not happen. Had the books been released to the first appellant, he would most probably earn some income out of its sale since the books had not been banned. Therefore, to further detain the books without any further action to ban them for their obnoxious contents that affronted the public or to keep them as material evidence by charging the first appellant in court for the alleged offence was to deny the first appellant his constitutional right to make a living under art 5 of the Federal Constitution from the sales of those books (see para 63).

(6) With regard to the argument that the claim for damages was not pleaded, this was not fatal in the circumstance. The appellants had, in their statement of claim, included an omnibus prayer for 'such relief as the court deems fit'. This form of prayer is not mere ornamental to grace the

pages of a claimant's statement of claim. Pursuant to this prayer the court may, if the facts and circumstances of the case warrant, make an appropriate order to grant relief though not pleaded but would do justice between the parties. This case was one of those cases (see para 64).

[Bahasa Malaysia summary

Pada 24 September 2010 lebih kurang pukul 4 petang sepasukan pewagai polis yang diketuai oleh defendan pertama, Penolong Superintendan Polis telah membuat serbuan dalam premis pejabat plaintif-plaintif di Brickfields, Kuala Lumpur, menangkap plaintif pertama dan merampas 66 buku bertajuk '*Cartoon-O-Phobia*' ('buku tersebut') serta kolaj artisitik ('kolaj tersebut'). Plaintif kedua adalah pengedar buku tersebut. Menurut plaintif pertama, selepas tangkapannya dia telah dibawa ke beberapa balai polis di Kuala Lumpur dan Selangor dan akhirnya sebelum tengah malam dia dibawa oleh defendan-defendan ke Balai Polis Sepang dan kemudian ditahan reman di Balai Polis KLIA pada malam itu. Hari berikutnya iaitu 25 September 2010, plaintif telah dibawa ke hadapan majistret di Mahkamah Majistret Sepang di mana dia telah diperintah untuk ditahan dalam jagaan polis untuk sehari. Plaintif pertama telah dibebaskan pada 25 September 2010 selepas kenyataannya direkodkan oleh polis. Polis juga telah menyerbu premis percetakan di mana 10 buku, dokumen berkaitan pesanan cetakan dan plet-plet percetakan dirampas. Perayu pertama telah dibebaskan pada 25 September 2010, hanya pada 6.30 petang selepas kenyataannya direkodkan. Tiada siasatan dijalankan ke atas perayu pertama selain daripada merekodkan kenyataannya. Perayu-perayu tidak dituduh di mahkamah selepas tahanan dan tangkapan berkaitan kandungan buku-buku yang dirampas itu. Buku-buku tersebut juga tidak dilarang oleh pihak berkuasa. Mahkamah Tinggi telah menolak tuntutan perayu-perayu untuk tahanan yang menyalahi undang-undang dan pemenjaraan palsu. Walau bagaimanapun Mahkamah Tinggi memutuskan bahawa rampasan dan penahanan berterusan buku-buku dan kolaj tersebut tidak menyalahi undang-undang dan Mahkamah Tinggi memerintahkan agar ganti rugi ditaksir terhadap responden-responden kerana rampasan yang menyalahi undang-undang dan penahanan berterusan buku-buku dan kolaj tersebut. Perayu merayu terhadap penolakan tuntutan perayu kerana penahanan yang menyalahi undang-undang dan pemenjaraan palsu dan responden-responden telah membuat rayuan balas terhadap ganti rugi yang diaward kerana rampasan yang menyalahi undang-undang dan penahanan berterusan buku-buku dan kolaj tesebut.

Diputuskan, menolak rayuan dan rayuan balas:

(1) Defendan bergantung kepada s 23 Kanun Tatacara Jenayah ('KTJ'), s 11 Akta Hasutan 1948 ('Akta 15') dan s 20 Akta Penerbitan 1984 ('Akta 301'). Dalam kesemua tiga peruntukan tersebut ungkapan-ungkapan 'reasonable suspicion', 'reasonably suspected of unlawful possession' dan

'reasonably suspected of committing … any offense' digunakan. Ungkapan-ungkapan tersebut menunjukkan bahawa pegawai tangkapan perlu membentuk pendapat untuk meyakinkan dirinya bahawa terdapat bukti untuknya mensyaki secara munasabah bahawa kesalahan telah dilakukan dan ia telah dilakukan oleh perayu-perayu. Beban bukti bahawa tangkapan itu adalah sah dan bahawa keterangan di mana tangkapan itu dibuat telah memenuhi ujian syak munasabah yang berdasarkan keseluruhannya atas responden pertama (lihat perenggan 17).

(2) Tiada apa-apa yang salah dengan pegawai tangkapan iaitu responden pertama membentuk pendapat bahawa kandungannya adalah berunsur hasutan dengan menyelak halaman-halaman buku *Cartoon-O-Phobia* dan dengan melihat kolaj tersebut. Kesimpulan sama ada terdapat alasan munasabah untuk syak wasangka bagi mewajarkan tangkapan dan tahanan itu adalah separa subjektif dan separa objektif. Bahagian subjektif itu adalah pegawai tangkapan hendaklah membentuk syak wasangka tulen pada masa membuat tangkapan bahawa orang yan ditahan itu telah melakukan kesalahan di bawah Akta berkaitan. Bahagian objektif adalah di mana pegawai tangkapan hendaklah menunjukkan atau hendaklah mempunyai alasan munasabah untuk timbul rasa syak itu (lihat perenggan 18–19).

(3) Responden pertama adalah wajar dalam pendapatnya terdapat rasa syak yang munasabah bahawa perayu pertama telah melanggar peruntukan Akta 15, meskipun pihak berkuasa berkaitan tidak melarang buku itu atau mengisytiharnya sebagai penerbitan yang dilarang atau bahawa tiada pertuduhan untuk apa-apa kesalahan di bawah Akta 15 ataupun Akta 301 telah dibuat terhadap perayu pertama (lihat perenggan 34).

(4) Tiada keterangan yang jelas untuk menunjukkan bahawa DW2 telah membawa perayu pertama berpusing-pusing ke beberapa balai polis hanya untuk menghalang pelancaran buku-buku perayu pertama pada hari sama tangkapannya. Fakta di mana tiada pertuduhan telah dibuat terhadap perayu pertama berkaitan tangkapan dan penerbitan buku-buku itu bukan keterangan mencukupi untuk mencadangkan bahawa terdapat niat jahat dalam perbuatan defendan-defendan. Perayu pertama ditahan dahulu atas rasa syak yang munasabah melakukan kesalahan dan dia kemudian telah ditahan di bawah perintah sah oleh majistret menurut s 117 KTJ. Oleh itu, penahanan perayu pertama dan penahanan selanjutnya adalah sah (lihat perenggan 50–52).

(5) Perayu pertama mempunyai reputasi sebagai kartunis. Kerja-kerja artistiknya telah ditawarkan untuk jualan kepada pihak awam dan dia menjadikannya sumber pencariannya. Sehingga tarikh perbicaraan rayuan ini tiada tindakan telah diambil oleh pihak berkuasa berkaitan untuk melarang buku-buku tersebut yang telah dirampas dari premis

perayu-perayu; dan perayu pertama tidak dituduh untuk kesalahan yang dikatakan itu. Semestinya dalam masa dua tahun hingga tarikh perbicaraan di Mahkamah Tinggi, pihak berkuasa berkaitan patut telah membentuk pendapat sama ada untuk meneruskan dengan pertuduhan ke atas perayu pertama di mahkamah kerana kesalahan yang dikatakan itu atau sekurang-kurangnya melarang buku-buku tersebut dijual kepada pihak awam jika didapati bahan itu menyinggung dalam apa cara menurut undang-undang. Namun itu tidak berlaku. Jika buku-buku itu diberikan kepada perayu pertama, dia mungkin dapat memperoleh pendapatan daripada jualannya kerana buku-buku itu tidak dilarang. Oleh itu, untuk penahanan selanjutnya buku-buku tersebut tanpa apa-apa tindakan seterusnya untuk melarang buku-buku tersebut kerana kandungannya yang jelik akan menyinggung pihak awam atau untuk menyimpan buku-buku tersebut sebagai bukti utama dengan menuduh perayu pertama di mahkamah kerana kesalahan yang dikatakan itu adalah untuk menafikan perayu pertama hak perlembangannya mencari pendapatan di bawah perkara 5 Perlembagaan Persekutuan daripada jualan buku-buku tersebut (lihat perenggan 63).

(6) Berhubung hujah bahawa tuntutan untuk ganti rugi tidak dipli, ia tidak memudaratkan dalam keadaan berikut. Perayu-perayu telah, dalam penyataan tuntutan mereka, memasukkan pelbagai bayaran untuk 'such relief as the court deems fit'. Permohonan begini bukan hanya hiasan semata-mata untuk dimasukkan dalam penyataan tuntutan penuntut. Menurut permohonan ini mahkamah boleh, jika fakta dan keadaan kes mewajarkan, membuat perintah yang sesuai untuk memberikan relief meskipun tidak dipli tetapi ia akan berlaku adil antara pihak-pihak. Kes ini adalah salah satu kes sebegitu (lihat perenggan 64).]

Notes

For a case on wrongful detention by police, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2222.

For cases on damages, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2218–2219.

For cases on issue not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6485–6494.

For cases on personal liberty, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2546–2561.

Cases referred to

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156, FC (refd)

Dumbell v Roberts and Ors [1944] 1 All ER 326, CA (refd)

Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, FC (refd)

McArdle v Egan (1934) 150 LT 412, CA (refd)

A *Minister of Home Affairs v Chu Choon Yong & Anor* [1977] 2 MLJ 20, FC (refd)
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286, HL (refd)
Pengarah Tanah Dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (folld)
B *Ramly & Ors v Jaffar* [1968] 1 MLJ 209, FC (refd)
Savrimuthu v PP [1987] 2 MLJ 173; [1987] 1 CLJ 368, SC (refd)
Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42, CA (refd)

Legislation referred to

C Criminal Procedure Code ss 23, 23(1)(a), 28, 28(2), (3), 117
Federal Constitution arts 5, 5(1), 145
Prevention of Terrorism (Temporary Provisions) Act 1984 [UK] s 12(1)
Printing Presses and Publications Act 1984 ss 2, 7(1), 20
Sedition Act 1948 ss 2, 3(1), 4(1)(a), (b), (c), (d), 4(2), 11

D

Appeal from: Civil Suit No 21 NCVC–146 of 2011 (High Court, Kuala Lumpur)

R Sivarasa (Muhammad Afiq bin Mohd Noor with him) (Daim & Gamany) for the appellant.
E *Normastura Ayub (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

Abdul Aziz Abd Rahim JCA (delivering judgment of the court):

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[1] The appellant's appeal before us is against the dismissal of the appellant's claim for unlawful detention and false imprisonment. There is also a cross-appeal by the respondents on the High Court's finding with regard to the unlawful seizure and continued detention of the 66 books and the artistic collage.
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[2] The material facts for this appeal as found in the grounds of judgment by the learned judicial commissioner are as follows:

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> On or about 24 September 2010 at about 4.00pm a team of police officers headed by the first defendant, an Assistant Superintendent of Police (ASP) had raided the plaintiffs' office premises at No 153-1, Jalan Sultan Abdul Saman, Brickfields, Kuala Lumpur (the said premises) and had arrested the first plaintiff and seized 66 books entitled '*Cartoon-O-Phobia*' ('the book') as well as an artistic collage ('collage'). The
I second plaintiff is the distributor of the book.
>
> … The first plaintiff states that upon his arrest he was taken to a number of police stations in Kuala Lumpur and Selangor and finally before midnight he was taken by the defendants to Balai Polis Sepang and thereafter was kept in remand at the Balai Polis KLIA that night. The following day ie on 25 September 2010, the first plaintiff

was brought before a Magistrate at the Sepang Magistrate's Court where he was ordered to be remanded in police custody for one day. The first plaintiff was released on 25 September 2010 after having his statement recorded by the police.

The above material facts are generally and substantially not in dispute.

[3] However, the appellants also alleged that on the same day and at the same time as the raid on the plaintiffs' office premises at No 153-1, Jalan Sultan Abdul Saman, Brickfields, Kuala Lumpur, a different team of policemen headed by DW3 ASP Zaiharul raided a printing house with the address Syarikat Vinlin Press Sdn Bhd at Meranti Permai Industrial Park at Puchong, Selangor where 10 books and documents related to print orders were seized. The appellants also alleged that on the morning of 25 September 2010, the police had made a follow-up raid at Vinlin Press and seized printing plates and during the evening, the police had paid a visit to the *Malaysiakini* office at Bangsar, Kuala Lumpur. The appellants further alleged that the first appellant was released on 25 September 2010, only at 6.30pm after his statements were recorded by the second respondent from 11am to 1pm in the afternoon. There was no other investigation carried out on first appellant other than the recording of his statements.

[4] Learned senior federal counsel did not seriously dispute the allegations except that the raid on the printing house of Syarikat Vinlin Press Sdn Bhd at Meranti Permai Industrial Park at Puchong, Selangor was conducted at the different time on the same day as the raid on first appellant's premises at the above address at Brickfield.

[5] It is not disputed that until today the appellants have never been charged in court after the detention and arrest in relation to the contents of the seized books. Also to-date the books have never been banned by the authorities.

THE FINDINGS OF THE HIGH COURT

[6] On 31 July 2012, the High Court of Malaya at Kuala Lumpur dismissed the appellants' claim for unlawful detention and false imprisonment. However the High Court also held that the seizure and the continued detention of 66 books titled '*Cartoon-O-Phobia*' and artistic collage was unlawful and the High Court ordered that damages be assessed against the respondents for the unlawful seizure and continued detention of the said 66 books and the artistic collage.

[7] In arriving at his decision, the learned judicial commissioner had also referred to the power of arrest found in the Criminal Procedure Code ('CPC'),

the Sedition Act 1948 and the Printing Presses and Publications Act 1984. The relevant provisions of the respective Acts referred by the learned judicial commissioner are produced below:

Section 23 of the CPC which provides that:

(1) Any police officer or penghulu may without an order from a Magistrate and without a warrant arrest (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having been so concerned.

Section 11 of the Sedition Act 1948 provides that

Any police officer not below the rank of an inspector may arrest without warrant any person found committing or reasonably suspected of committing … any offence against this act, or reasonably suspected of the unlawful possession of any thing liable to forfeiture thereunder.

Section 20 of the Printing Presses and Publications Act 1984 provides that

Any police officer may arrest without warrant any person found committing or reasonably suspected of committing … any office under this Act.

OUR OPINIONS

[8] In their memorandum of appeal, the appellants listed eight grounds for the appeal. Firstly, it was said that the learned judicial commissioner had misdirected himself on fact and law that the opinion by DW1 that the content of the *Cartoon-O-Phobia* is in contravention of the Sedition Act 1948 and the Printing Presses and Publication Act 1984 is a reasonable conclusion made by a reasonable man. Secondly, the learned judicial commissioner had misdirected himself when he accepted the explanation by DW2 as being reasonable to explain how the first plaintiff (ie the first appellant) was taken to various police station before he was detained at KLIA Police Station. Thirdly, the learned judicial commissioner had misdirected himself when he concluded that there was no cogent evident that DW2 had taken the first appellant to the various police station before detaining him at KLIA Police Station simply for the purpose of preventing the first appellant from launching his book on the same day and thus, rendering the arrest of the first appellant as lawful. Fourthly, the learned judicial commissioner had erred on law and facts and had misdirected himself when he decided that the arrest of the first appellant by DW1 was lawful. Fifthly, the learned judicial commissioner had erred in law and facts and had misdirected himself when he decided that DW1 had informed the grounds

for the arrest to the first appellant and that the first appellant's constitutional rights was not violated. Sixthly, the learned judicial commissioner had erred in law and facts and had misdirected himself when he failed to take into consideration the entire facts and evidence that the arrest of the first appellant is unlawful and wrong in law and that the first appellant's constitutional rights were violated or the arrest was effected with malice. Seventhly, the learned judicial commissioner had erred in law and facts and had misdirected himself when he failed to take into consideration the entire facts and evidence that the arrest, detention and forfeiture of the books *Cartoon-O-Phobia* on the day the books were about to be launched is unlawful, malicious and legally baseless and politically motivated. Eighthly, the learned judicial commissioner had erred in law and facts and had misdirected himself when he failed to take into consideration the entire facts and evidence that as consequence of the defendants' actions, the first appellant is entitled to damages for wrongful arrest and detention including aggravated and exemplary damages.

[9] In short, the above grounds of appeal as stated in the appellants' memorandum of appeal may be summarised or condensed into four main grounds as follows:

(a) the learned judicial commissioner had erred and misdirected himself in holding that the actions by DW1 and DW2 under the applicable laws in this case are reasonable;

(b) the learned judicial commissioner had erred and misdirected himself in holding that the arrest and detention of the first appellant are lawful and reasonable;

(c) the learned judicial commissioner had erred and misdirected himself in holding that the arrest and detention of the first appellant, and the detention of the books *Cartoon-O-Phobia* was not motivated by malice or unlawful or with the purpose of preventing the launching of the books on the same day of the arrest; and

(d) the learned judicial commissioner had erred and misdirected himself in holding that the first appellant was not entitled to damages including aggravated and exemplary damages for wrongful arrest and detention.

[10] In their defence, the respondents contended that the arrest of the first appellant and the seizure of the books were lawful and was done in accordance with the law. The respondents also pleaded in their defence that the first respondent upon perusing and checking the contents of the book had formed a reasonable opinion and suspicion that the publication was an offence under the Sedition Act 1948 and/or the Printing and Publications Act 1984 in that it had a tendency to bring hatred, contempt or to excite disaffection against the government and the administration of justice in Malaysia. The respondents

also pleaded that the first respondent had explained to the first appellant the reason for the arrest and seizure before making the said arrest and seizure.

[11] First, we will discuss ground (a) and (b) that we have summarised above, together. In the appellants' outline submission, these two grounds were canvassed under the heading of the reasonableness or otherwise of the arrest of the first appellant. Learned counsel for the appellants submitted that the actions by DW1 and DW2 in arresting the first appellant and detaining the books '*Cartoon-O-Phobia*' were unreasonable. As for the unlawfulness of the arrest of the first appellant, it was submitted that the learned judicial commissioner had failed to take into account that the version of the arresting officer that upon flipping through the pages of the book he was able to form the view that it was contrary to the Sedition Act 1948 and/or the Printing Presses and Publications Act 1984. He also submitted that the first respondent's own evidence shows that the first respondent had never seen the book or the collage before. Therefore, it was suggested that more time would be required for the first respondent to evaluate the contents of the book to enable him to form an opinion that the contents of the book was contrary to the Sedition Act 1948 or the Printing Presses and Publications Act 1984. Therefore, it was contended that the reasonable act to do was for the first respondent or the police to have taken away sufficient copies of the books to be evaluated and to decide whether the books were indeed seditious and its contents violate the Sedition Act 1948 and the Printing Presses and Publications Act 1984. However, it was argued in this case that in arriving at his conclusion that the books and its contents were seditious, the first respondent had formed such opinion by merely flipping through the pages of the books which the first respondent himself admitted in evidence that he had never seen them before. That, learned counsel for the appellants submitted is being unreasonable.

[12] To support his argument, learned counsel referred to excerpts from the examination in chief of PW2 (at pp 45–46 *Rekod Rayuan Tambahan* 2) as follows:

> Peguam Plaintif: Adakah anda ada bercakap dengan pihak polis?
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> Saksi: Ya, saya dan Eric Paulsen bertanya kepada Defendan Pertama asas penangkapan Zunar dan rampasan buku-buku kartun tersebut. Defendan Pertama telah gagal untuk memberitahu dengan jelas dan tegas bahagian manakah di dalam buku tersebut yang telah menyalahi undang-undang dan asas penangkapan dan rampasan buku-buku kartun tersebut. Apabila didesak oleh kami berdua Defendan Pertama dan secara rambang telah menunjuk kepada beberapa lukisan kartun-kartun dan menyatakan bahawa kartun-kartun tersebut bersifat menghasut dan merupakan kesalahan di bawah Akta Hasutan. Saya dan Eris Paulsen juga ada bertanya mengapa Zunar ditangkap pada petang

> hah di mana pada malamnya beliau telah merancang untuk melancarkan buku kartun '*Cartoon-O-Phobia*' di Dewan Perhimpunan Cina Kuala Lumpur & Selangor.

[13] PW2 is an advocate and solicitor practicing at Tetuan Daim & Gamany. In her evidence, she testified that when the first appellant contacted her about the arrest and the detention of the books '*Cartoon-O-Phobia*' she and another non-practicing lawyer Mr Eric Paulsen went to the first appellant's office at Brickfield, and on arrival they saw the police party headed by the first respondent seized 66 copies of the book *Cartoon-O-Phobia* and a black and white collage measuring A2 size. She further testified that when she confronted the first respondent for explanation, she was told that the collage was seditious.

[14] Learned counsel for the appellants also referred to the evidence of DW1 (ie the first respondent's witness — at pp 70–72 of *Rekod Rayuan Tambahan* 2) in examination in chief which read as follows:

> Yang Arif, saya terus membuat pemeriksaan di premis tersebut dan saya menjumpai sebuah buku bertajuk '*Cartoon-O-Phobia*' di atas meja buku. Saya telah menyemak buku tersebut dan mendapati setiap muka surat buku tersebut mengandungi gambaran kartun yang merujuk kepada pemimpin Negara, pasukan polis, badan kehakiman, SPRM dan sebagainya yang boleh atau cenderung untuk menghasut rakyat dengan cara menimbulkan rasa benci, salah faham, kehinaan serta menyebabkan masyarakat keliru dan hilang kepercayaan terhadap pihak-pihak yang dirujuk serta mempunyai unsur niat jahat bagi tujuan permusuhan kaum dan agama. Hasil penelitian saya terhadap buku tersebut juga menyebabkan saya menyimpulkan bahawa buku tersebut berkemungkinan akan diharamkan penerbitannya atau penjualannya.

[15] Learned counsel for the appellants also referred to the testimony of DW1 in which DW1 disagrees with the suggestion that in order to satisfy himself that the cartoon found in the books were seditious or otherwise, he ie DW1 only required to take one copy of the books and not otherwise. In his testimony in cross-examination DW1 said as follows:

> Memandangkan kartun-kartun dalam buku ini, mempunyai elemen-elemen menghasut saya terpaksa merampas kesemua buku-buku itu tersebut atas sebab kemungkinan buku-buku ini boleh diedarkan di pasaran itulah keputusan yang saya buat semasa saya membuat serbuan, Yang Arif. Sebab ia boleh menghasut. Tidak mencukupi setakat saya mengambil sebuah naskhah sedangkan yang lain masih dalam premis tersebut. Yang saya khuatir kemungkinan disebarkan dalam pasaran orang ramai untuk menghasut. Sebab itu saya merampas keseluruhan jumlah buku yang saya jumpa …

[16] The question of course, in circumstances as shown by the testimony of

PW1 and DW1, is whether the actions by DW1 were reasonable to justify that the arrest of the first appellant and the detention of the books were justified and lawful. We agree with the learned judicial commissioner that every detention is prima facie unlawful and when challenged the burden of proof to justify the detention is on the detaining authority.

[17] In the present case the defendant relied on s 23 of the CPC, s 11 of the Sedition Act 1948 and s 20 of the Printing Presses and Publications Act 1984. In all the three provisions the expressions 'reasonable suspicion', 'reasonably suspected of unlawful possession' and 'reasonably suspected of committing … any offense' are used. These expressions show that the arresting officer must form an opinion to satisfy himself or herself that there is evidence for him or her to reasonably suspect that an offence has been committed and it is committed by the appellants. Therefore, having regard to the language used in the three provisions relied on by the arresting officer (that is the first respondent) to arrest the first appellant in this case, we are of the view that the burden to prove that the arrest was lawful and that the evidence on which the arrest was grounded had satisfied the test of reasonable suspicion rests entirely on the first respondent. This burden never shifts.

[18] The complaint by the appellants in respect of this issue is that the first respondent had formed an opinion that the content of the book *Cartoon-O-Phobia* is seditious merely by flipping the pages of the books which by his own admission he had never seen before. As stated earlier, learned counsel for the appellants argued that the respondents, in particular the first respondent, should take time to evaluate the books before forming the opinion that the contents of the books are seditious and therefore justify the arrest.

[19] We do not think that there is anything wrong with the arresting officer ie the first respondent forming his opinion that the contents were seditious by flipping through the pages of the book *Cartoon-O-Phobia* and by looking at the collage. In our view the law on this subject is clear that under those provisions, the conclusion whether there exists reasonable grounds for the suspicion to justify the arrest and detention is partly subjective and partly objective. The subjective part is that the arresting officer must have formed a genuine suspicion at the time of making the arrest that the person being arrested is committing the offence under the relevant Acts. The objective part is that the arresting officer must show or must have reasonable grounds for forming such suspicion. This principle was stated by Lord Hope of Craighead in House of Lords case of *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at p 298 as follows:

> My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have

> formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

[20] The facts of *O'Hara* are as follows: The appellant was arrested at his home by the detective constable of Royal Ulster Constabulary under s 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984. The arrest was effected pursuant to information received at a briefing during which the detective constable was informed that the appellant was involved in a murder. But the constable had no basis for suspecting that the appellant had been involved in the commission of acts of terrorism. The first appellant was later released without being charged of any offence. The appellant then took an action against the chief constable to claim damages for wrongful arrest. The action was dismissed by the High Court which held that the detective constable had a reasonable suspicion of the appellant's involvement in the murder based on the information given to him at the briefing and that the arrest was lawful under s 12(1)(b). The appellant's appeal to the Court of Appeal was dismissed and the appeal to the House of Lords was also dismissed.

[21] In that case the court was dealing with s 12(1) of the English Prevention of Terrorism (Temporary Provisions) Act 1984. The provision reads as follows:

> Subject to subsection (2) below, a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be (a) a person guilty of an offence under section 1, 9 or 10 above; (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies; (c) a person subject to an exclusion order.

[22] We acknowledge that the above provision is not on all fours with any of the three provisions of the relevant Acts relied on by the respondents in the present case. However, we noted that the English provision also contained the expression 'reasonable grounds for suspecting … '. Though this expression is not exactly the same as the expressions 'reasonable suspicion', 'reasonably suspected of unlawful possession' and 'reasonably suspected of committing … any offense' used in the three relevant provisions of our Acts; it connotes or embodies the same standard or principle to be exercised by the arresting officer; that is the arresting officer is required to exercise his or her judgment to satisfy him or herself that there are reasons to suspect that the first appellant is committing an offence under the relevant Acts that justify the arrest.

[23] Our own Federal Court in *Ramly & Ors v Jaffar* [1968] 1 MLJ 209 had said that the question whether there was a reasonable and probable cause must be determined objectively on the evidence before the court and in this case there was reasonable suspicion that the respondent was concerned in a seizable offence and therefore the arrest was not wrongful. In other words, when an arrest made by an arresting officer is challenged on the ground that it is unlawful for want of reasonable or probable cause, the court as trier of facts has to examine the evidence presented objectively and arrived at the conclusion whether or not a case of reasonable suspicion or probable cause is established.

[24] In *Ramly & Ors*'s case, the plaintiff claimed for damages for wrongful arrest. In that case an officer of the Department of Irrigation and Drainage had made a report to the effect that a part of the irrigation bund in Kampung Perol had been damaged by some person or persons unknown. Acting on information received, one Corp Jalal, the officer in charge of the police station concerned, arrested a person by the name of Zakaria. The latter was subject to prolong interrogation during which Zakaria gave information to the effect that he and the respondent were responsible for the digging up of part of the bund in question. Based on the information given by Zakaria, Corp Jalal arrested the respondent. The trial court found as a fact that Corp Jalal informed the respondent the reason for his arrest immediately after arrest. The issue in *Ramly & Ors*'s case is whether the statement made by Zakaria to Corp Jalal in the course of the interrogation is a credible information or whether it gives rise to reasonable suspicion against the respondent within the meaning of s 23(1)(a) of the CPC. The trial court concluded that it was not. However, the Federal Court disagreed and concluded that there was reasonable suspicion that the respondent was concerned in a seizable offence. This is obvious from the passage in the judgment of Azmi CJ Malaya at p 211 of the report which reads as follows:

> Assuming that Zakaria had been questioned for three hours, and had as a result broken down and confessed implicating the respondent as well, the question is not whether the means employed to extract the information is right or wrong but whether his suspicion was reasonable judging from the facts he had before him. The judge has found that the means employed was persuasion which is a most commendable way of obtaining information. It is not suggested that the Corp persuaded Zakaria to implicate respondent but only that he persuaded him to tell the truth. If the Corp had persuaded Zakaria to implicate the respondent then he must have had information from somewhere else that the respondent was involved, in which case, he need not have persuaded Zakaria to implicate him for the purpose.
>
> In my view, there was a reasonable suspicion that the respondent was concerned in a seizable offence …

[25] The learned judicial commissioner in the present appeal had dealt extensively with the law relating to reasonable suspicion by referring to several

authorities including *Ramly & Ors*'s case and had concluded that the first respondent had had sufficient evidence to form an opinion that the first appellant is reasonably suspected of committing an offence under the relevant law. Citing a passage by Scott LJ at p 329 from the English case of *Dumbell v Roberts & Ors* [1944] 1 All ER 326, the learned judicial commissioner cautioned that reasonable suspicion should not be equated with prima facie proof. The distinction, the learned judicial commissioner says, is that prima facie proof consists of admissible evidence; but suspicion takes into account matters that could not be put in evidence of a prima facie case. He cited the case of *McArdle v Egan* (1934) 150 LT 412 to support his view.

[26] We agree with the learned judicial commissioner on the law as to reasonable suspicion and also with his conclusion that there is reasonable suspicion being established in this case. The facts of this case show that the first respondent acting on information received had, together with a team of police officers raided the second appellant's premises at about 4pm on 24 September 2010. At the premises, the first respondent found 66 books entitled *Cartoon-O-Phobia* which consists of compilation of socio-political cartoons drawn by the first appellant. The first respondent testified that upon examining the contents of one of the books, he formed an opinion that the cartoons depicted therein were seditious in nature; in that it had a tendency to bring hatred, contempt or to excite disaffection against the government and the administration of justice in Malaysia. He was of the belief that the book contravened the Sedition Act 1948 and the Printing Presses and Publications Act 1984.

[27] We will digress at this point and take a look at the relevant provision in the Sedition Act 1948 (Act 15) and the Printing Presses and Publications Act 1984 (Act 301).

[28] In Act 15, the word *seditious* is defined in s 2 to mean *when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency*; and the expression 'seditious tendency' is defined in s 3(1) as follows:

> (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
>
> (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise then by lawful means, of any matter as by law established;
>
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the ruler of any State or amongst the inhabitant of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.

[29] It is an offence under s 4(1) of the same Act for any person (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency; (b) utters any seditious words; (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or (d) imports any seditious publication. Section 4(2) also makes it an offence for any person who has in his possession any seditious publication without lawful excuse.

[30] With regard to the books, the first respondent had testified that having examined the books by flipping through its pages, he had formed the opinion that the book contained seditious material as some of the cartoons showed the judiciary being under the clutches of the executive and the police force was depicted as being under the control of the ruling political party, namely UMNO. This, according to the opinion of the first respondent, had a tendency to create hatred against government institutions and the judiciary.

[31] The learned judicial commissioner had the opportunity to look at the allegedly offended materials in this case and he concluded in his judgment as follows (at p 13 *Rekod Rayuan Tambahan*):

> I find that objectively looking at it, the cartoons depicted in the book may be considered political satire by some, while others may regard them as being seditious. DW1 obviously belongs to the second category and that cannot be held against him. Therefore, I find that the opinion formed by DW1 that the contents of the books were an offence against the SA and PPPA is a reasonable conclusion to be formed by a reasonable man.

[32] As to the relevant provision in the Printing Presses Publications Act 1984 (Act 301), we would refer to s 7 of the said Act which speaks of undesirable publications. Section 7(1) of Act 301 reads:

> (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, the relationship with any foreign country or government, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to

such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication.

[33] Under s 2, the Interpretation of Act 301, the expression *prohibited publications* means *any publication which has been prohibited under sub-s (1) of s 7 and includes any copy, reproduction, extract or any translation, precis or paraphrase thereof.*

[34] In our view the above provisions of Act 301 may not be relevant because the Minister has not made the order to prohibit the publication of the books of the allegedly offended books in this case. However, having regard to the above quoted provisions of Act 15, we agree with the learned judicial commissioner that the first respondent was justified in his opinion that there was reasonable suspicion that the first appellant has contravened the provision of Act 15, notwithstanding that until today the relevant authority has not banned the book or declared it as prohibited publication or that no charge for any offence under either Act 15 or Act 301 has been preferred against the first appellant.

[35] The next complaint by the first appellant is that his detention after the arrest was unreasonable. His contention was that after he was arrested he was taken by the first respondent to Brickfield Police Station. There it appears that the first appellant was kept waiting for three to four hours before he was taken to Petaling Jaya Police Station. On the way to Petaling Jaya Police Station, instruction was given to take the first appellant to Puchong Police Station and again while on the way to Puchong Police Station, further instruction was given to take the first appellant to Sepang Police Station. According to the evidence of the first respondent, they reached Sepang Police Station around midnight the same day. Therefore, it appears that the first appellant was in the custody of the arresting officer between 4pm on the date of arrest ie 24 September 2010 until midnight the same day before the first appellant was handed over to the investigating officer ('IO') at Sepang Police Station. The fact that the first appellant was brought from one police station to another before he was handed over to the IO and held at the Sepang Police Station for a night is not disputed. It is the contention of the appellants that this conduct of the police in arresting, detaining and transportation of the first appellant from the time of arrest until the handing over to the IO at Sepang Police Station is indicative of the malicious nature of the arrest.

[36] The learned judicial commissioner in his judgment had accepted the explanation given by the respondents' witnesses as to why the first appellant was taken to the various police stations before the first appellant was handed over to the Sepang Police Station; and dismissed the allegation by the

appellants that the act was designed in order to frustrate the launching of the first respondent's book which was to take place on the same day of the arrest.

[37] The relevant passage in the learned judicial commissioner's judgment on this point is found at para 15 of his judgment and it reads as follows:

> [15] The first plaintiff also complains that he was then brought from one police station to another before he was held at the Sepang Police Station for the night. The plaintiffs contend that this is indicative of the malicious nature of the arrest. The defendants through their witnesses have given an explanation as to why they had to take the first plaintiff to the various police stations before finally holding him at the KLIA Police Station. I find that explanation given by DW2 to be plausible. There is no cogent evidence to indicate DW2 had taken the first plaintiff for a ride to various police stations merely to thwart the first plaintiff's launch of his book on the same day. In the circumstance, I find that the first plaintiff's arrest by the first defendant is lawful.

[38] However, the learned judicial commissioner did not state in his judgment what was the explanation given by the respondents' witnesses as to why they have to take the first appellant from one police station to another and kept him in detention from the time of arrest at 4pm until midnight the same day before handed him over to the IO at Sepang Police Station.

[39] We have scrutinised the evidence of the first respondent (DW1) on this point, in particular, in the notes of proceedings of the first respondent's cross examination (at pp 113 – 117 of *Rekod Rayuan Tambahan* (2)). But *we could not find any valid reason or explanation for such conduct*, except that the first respondent (DW1) received instructions to take the first appellant to the various police stations which finally ended up at Sepang Police Station; and that the first respondent testified that as arresting officer, he is not the one to issue an order for remand of the arrested person. That, according to DW1, is the job of the IO.

[40] Can this act of the respondents (in taking the first appellant on a joy ride from one police station to another) be considered as unreasonable and therefore render the detention of the first appellant for the period between the time of arrest and the handing over to the IO at Sepang Police Station unlawful? It was submitted by learned counsel for the appellants that during cross examination, DW4 had agreed with the suggestion by learned senior federal counsel that the first appellant was arrested on 24 September 2010 at about 4.24pm and that the cautioned statement by the first appellant was recorded on the next day on 25 September 2011 at about 6.30pm (refer to p 167 *Rekod Rayuan Tambahan* (2)). DW4 was the IO in this case. According to her evidence in chief in her witness statement DWS4, QA4 she received a phone call from one ASP Omar bin Mamah, *Pemangku Ketua Siasatan Jenayah*

Selangor instructing her to contact KBSJD Sepang ASP Zahairul regarding Putera Perdana Report No 3264/10 and that she was directed to be the IO of the case. At that material time, DW4 was the senior IO with IPD Shah Alam. On receiving the instruction, DW4 left for IPD Sepang at about 9.30pm the same day. On reaching IPD Sepang at about 10.30pm, she met ASP Zahairul in the latter's office. ASP Zahairul briefed DW4 on the raid conducted in relation to the Putera Perdana Report No 3264/10 and also handed over to her ten copies of the books *Cartoon-O-Phobia* and two CDs brand Sony CD-R. In her QA6 of her witness statement, DW4 also said that on arrival at IPD Sepang

> Saya juga telah menerima enam naskhah buku tersebut dan satu keping Kad Board kertas tebal yang mengukirkan sejenis kartun yang menggambarkan watak Datin Sen Rosmah dan Dato' Seri Samy Velu berukuran lebih kurang 102CM x 71 CM serta borang perakuan serah dan borang hak-hak orang ditangkap dan Sarjan Mohd Khuzaini bin Mat Wazir. Sarjan Mohd Khuzaini juga telah menyerahkan tangkapan seorang lelaki Melayu yang bernama Zulkfilee bin SM Anwarul Haque.
>
> (see p 75 Rekod Rayuan Bhg A, B and C).

[41] From the above evidence, it is obvious that the first appellant was handed over to DW4 the IO around 10.30pm the same day at IPD Sepang and DW4 further testified in QA9 of her witness statement that at about 12am she directed that the first appellant be remanded in the lockup at IPD Sepang to enable her to carry out further investigation; apparently under the Sedition Act 1948 (Act 15).

[42] In the circumstance, it was submitted by learned counsel for the first appellant that the first appellant was remanded purely to record his statement. It was also submitted in the circumstances, the remand of the first appellant was totally unnecessary and unreasonable. It was argued that the first appellant had a public profile as a respected cartoonist and was ever ready to assist in the police investigation including giving of statements. Therefore, it was contended that the first appellant should have been released on bail or on his personal cognisance after documentation of his arrest at Brickfields Police Station. Accordingly, it was submitted that on established case law and legal principles, the remand of the first appellant is a clear abuse of power and a violation of his rights.

[43] We will start our discussion on this issue by referring to art 5(1) of the Federal Constitution which provides that no person shall be deprived of his life or personal liberty save in accordance with law. As far as the law is concerned, we will now refer to s 28 of the CPC which provides as follows:

> 28 How person arrested is to be dealt with and detention for more than twenty-four hours.
>
> (1) A police officer making an arrest without a warrant shall without

unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate.

(2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.

(3) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

[44] Under the above provision of the CPC, a person should not be arrested and detained without warrant for more than 24 hours without him being released either on bail or on his own cognisance or being brought before a magistrate for further order including an order for further detention exceeding 24 hours, if necessary, in order to assist the police investigation.

[45] It is also pertinent to note that under s 28(2) of the CPC, it is provided that no police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable. In our view, the period referred to under this section does not include the first 24 hours from the time the arrest was made. We are of the view that the period referred to in this section is the period ordered by the magistrate pursuant to s 117 of the CPC. This is obvious from the reading of s 28(3) of the CPC.

[46] Reading ss 28(3) and 117 of the CPC, it is clear that a magistrate before whom a person arrested without warrant is produced can order a further detention of the person arrested for a period not exceeding 15 days in the whole excluding the first 24 hours. However, in determining the length of detention under s 117 of the CPC, the magistrate has to satisfy himself that the detention beyond the first 24 hours is necessary because the investigation into the matter for which the person was arrested, cannot be completed within the first 24 hours and that further detention is necessary to assist the police in completing the investigation. We say so because before the magistrate makes an order under s 117 of the CPC, he must satisfy himself as to the need or necessity for further detention by examining the entries in the investigation diary that must be produced before him which entries prescribe the investigation relating to the case for which further order of detention is sought.

[47] The IO (DW4) testified in her examination in chief that at about 6pm on 24 September 2010 she received a telephone call from her superior ACP Omar bin Mammah *Pemangku Ketua Siasatan Jenayah Selangor* in relation to the Putra Perdana Report No 3264/10. She testified that she was directed to be the IO for the report. She then proceeded to IPD Sepang and arrived there at about 10pm the same day. At IPD Sepang, she met and was briefed by ASP

Zaihairul (DW3) the raiding and arresting officer of the said report. She was also handed with 66 copies of books and other exhibits seized by the raiding officer and also the arrested person ie the first appellant. She started looking into the matter soon thereafter because in her evidence she said she later called ACP Omar Mammah to brief the latter on facts of the case and her findings as to the exhibits seized in the raid at the first appellant's premises. The whole process seemed to take some times because in her evidence DW4 said that at about 12am the same day she instructed the first appellant to be detained at the police lock up at Sepang for further investigation. We find nothing unreasonable in the act of the DW4 to order the detention of the first appellant in the police lock up at IPD Sepang in the circumstances. It appears to us that DW4 had commenced her investigation into the case the moment she was brief by DW3 and taking over all the exhibits and first appellant into her custody. DW4 is also human. Since 10pm that day she had been looking into the case until about 12am before she gave the order to have the first appellant detained in the police lock up for the night because she could not complete her investigation. Like any other overworked police officers DW4 also required the much needed rest to recuperate and be afresh again for tomorrow's work. The events that unfolded the next day 25 September 2010 supports such conclusion.

[48] On 25 September 2010 at 8am DW4 went to the Magistrate Court Sepang to apply for further remand of the first appellant. The magistrate allowed further remand of two days to expire on 26 September 2010. After the remand order, DW4 returned to IPD Sepang and at 1.30pm proceeded with a police party to Vinlin Press Sdn Bhd at Batu 15 Jalan Puchong Selangor to carry out investigation in relation to the Putra Perdana Report No 003264/10. At the said premises DW4 met a person by the name of Sum Chung Yeong and after carrying out investigation DW4 seized 52 printing plates titled *Cartoon-O-Phobia* which she believed to have been used to print the books by the same title which were handed over to her as IO at IPD Sepang the night before. DW4 Then at 3pm the same day DW4 and her police party visited Kinibooks' office at 48 Jalan Kemuja Bangsar Kuala Lumpur which she believed to be the office of the publisher *Malaysiakini* which published the books *Cartoon-O-Phobia* and there she met a person by the name of Gan Diong. However at the premises DW4 did not find anything incriminating and nothing was seized. DW4 testified that the first appellant was released on police bail on the same day as she completed her investigation ie 25 September 2010 at 6pm. The above facts were never challenged or contradicted by the first appellant.

[49] In our view police investigation into any complaint or reported crime is entirely within the discretion of the police as to methodology or time taken. There are various factors to be considered such as the seriousness and

complexity of the alleged crime, the availability of witnesses to be interviewed and statements to be recorded and the location, accessibility etc of the crime scene. So it is the police that has to decide how and what investigation to be carried out and whether arrest and detention of suspect is required to assist the investigation. Of course the investigation, particularly in respect of arrest and detention of the suspect, must be done in accordance with law. In this instant appeal there is evidence to show that DW4 had obtained the order of the magistrate to further detain or remand the first appellant until 26 September 2010 for further investigation. The first appellant did not challenge that order by the magistrate. Notwithstanding that the IO in this case, armed with the magistrate's order, could have detained the first appellant until 26 September 2010, the first appellant was released on 25 September 2010 ie one day earlier albeit late at 6pm after the IO had more or less completed her investigation. In our opinion therefore there is no merit in the complaint by the first appellant that he was detained or remanded unnecessarily by the defendants for investigation or that his detention was unlawful.

[50] With regard to the first appellant's complaint that his detention was motivated by malice in that it was an attempt to thwart the launching of the books *Cartoon-O-Phobia* we find that the trial judicial commissioner was correct in his conclusion that there is no cogent evidence to indicate that DW2 had taken the first appellant for a ride to various police stations merely to thwart the launch of the first appellant's books on the same day of his arrest. The fact that no charges were ever prefered against the first appellant in respect of the arrest and the publication of the books is in our view insufficient evidence to suggest that there was malice in the conduct of the defendants.

[51] We noted that under art 145 of the Federal Constitution the prerogative to institute and conduct prosecution rests with the attorney general. In this case no evidence was adduced to suggest that the first to four respondent had not referred the matter to the attorney general for advice whether the first appellant ought to be charged or otherwise. In the absence of such evidence it would be a mere speculations and conjectures that the first appellant's detention was malicious for the reasons stated. One also must not rule out the probability that the investigation papers in this case could have been referred to the attorney general but no decision as yet been taken on it and in the meanwhile the first appellant was released on police bail since his presence or remand is no longer needed for the purpose of the investigation.

[52] Learned counsel for the appellants had submitted that if it is for the recording of a statement from the first appellant, the detention is unnecessary and a further detention as in this case is unwarranted. However we have alluded to this argument and we disagreed with it. We reiterate that the detention or further detention of a suspect in assisting a police investigation is the discretion

of the police; but any detention or further detention must be done according to law. In this respect, we refer to the Federal Court's case of *Minister of Home Affairs v Chu Choon Yong & Anor* [1977] 2 MLJ 20 which approved a passage from *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156 (FC) found at p 158 and reads:

> … when a person complains that he is being illegally or improperly detained, it is for the detaining authority to justify the detention. If the person who signed that order had power to do so and had before, when and after signing that order, complied with all conditions laid down by the law, then the order of detention which is authentic and made in good faith is a sufficient answer, and the court must hold the order and detention lawful - unless the detainee alleges and can prove mala fides.

[53] In *Chu Choon Yong & Anor*'s case, the facts are that the respondents had been arrested and detained under banishment orders. As the Minister could not find a country willing to accept the respondents, no warrants of executions were issued and the respondents continued to be detained for more than three years. The respondents commenced and action against the appellant for unlawful detention. The High Court allowed the respondent's claim but on appeal to the Federal Court, the appeal was allowed with the Federal Court ruling that the learned High Court judge was in error when he found that the continued detention was unlawful. The Federal Court held that a valid detention order under the Banishment Order remains valid until revoked.

[54] Likewise in this case, the first appellant was first detained on reasonable suspicion of committing a crime and he was subsequently further detained under a valid order by a magistrate pursuant to s 117 of the CPC. Therefore we conclude that the first appellant's detention and further detention is lawful. Accordingly we agree with finding of the High Court on this issue.

[55] The next issue in this appeal is in respect of the respondents' cross-appeal against the decision of the High Court which had allowed the appellants' claim for wrongful detention of the 66 books entitled *Cartoon-O-Phobia* and the collage which were seized on 24 September 2010 and had ordered damages to be assessed.

[56] With regard to this cross-appeal, the respondents submitted that it should be allowed for the following reasons: first, damages for wrongful continued detention of the books were not pleaded. Two, the continued detention of the books and collage is warranted because they are material evidence to prove the commission of the crime and thirdly, the decision to charge or not to charge the appellant with any offence related to the books and collage lies with attorney general and that no specific time frame is provided in law to deal with the seized goods when there is no prosecution and that in this case the investigation was still pending at the trial.

[57] Having heard senior federal counsel's submissions on the grounds advanced by the respondents for the cross appeal and having read and given our utmost considerations to the reasoning by the learned judicial commissioner in his judgment on this issue we find no merit in this cross-appeal.

[58] In his judgment the learned judicial commissioner had taken cognizance that the books and the collage were seized on the grounds of reasonable suspicion of an offence having committed. He also noted that the books and the collage had been detained for almost two years without any further action and he concluded that such detention is unwarranted and unlawful. Relying on the authority of *Pengarah Tanah Dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC), which states the principle that every legal power must have legal limits and that there is a stringent requirement that a discretion should be exercised for a proper purpose, and it should not be exercised unreasonably, the learned judicial commissioner was of the view that the respondents have failed to give cogent explanation or reasons for the continued detention of the books and the collage. He also of the view that law does not allow for indefinite detention of seized goods without proper reason.

[59] The learned judicial commissioner also expressed the view that the determination of whether the police intend to proceed further to charge the appellant in court must be made within reasonable time.

[60] On the senior federal counsel's submission that power to institute criminal proceedings lies with the attorney general and therefore no time limit can be imposed on the police to decide whether to continue detaining the books and collage which is purportedly to be evidence of a crime committed, we refer to a passage from the Federal Court case of *Savrimuthu v Public Prosecutor* [1987] 1 MLJ 173; [1987] 1 CLJ 368 which was cited by the learned judicial commission in his judgment; and the passage reads:

> … public interest, reason, and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

[61] We fully subscribed to the view expressed by the Federal Court in *Sri Lempah Sdn Bhd*'s case that where the discretion is wrongly exercised or is exercised for improper reason it becomes the duty of the courts to intervene.

[62] Whilst we agree that the law does not impose a time limit on the police to complete their investigation and that no law imposes any time frame on the attorney general to decide whether or not to prosecute the alleged offender once the investigation is completed, we are constrained to say that what is reasonable in any circumstance depends on the facts and circumstances of each

case. Take this case for instance: the investigation had been completed almost two years by the time this case came to the High Court for trial. Until that date no charge had been preferred against the first appellant and in fact the first appellant had been released from police detention.

[63] The learned judicial commissioner had rightly pointed out that first appellant is a cartoonist of repute. His artistic works are offered for sale to the public and he makes a living out of it. It has been noted earlier in this judgment that until the date of the hearing of this appeal no action was taken by the relevant authorities to ban the books that were seized from the appellants' premises; and the first appellant has not been charged for the alleged offence until today. So, is the respondent's argument that the books and the collage were evidence of a committed crime can still stand as a reasonable ground to continue detaining the books? Surely within two years to the date of the trial at the High Court, the relevant authorities would have formed an opinion whether to proceed with charging the first appellant in court for the alleged offence or at the very least to ban the books for sale to the public if they found the materials are offending in any way according to law. But this does not happen. Can it therefore be said that the act of the respondent in keeping the books away from the first appellant to be a reasonable act in the circumstances? Had the books been released to the first appellant, he ie the first appellant would most probably earn some income out of its sale since the books have not been banned. In this regard we agree with the learned judicial commissioner on the authorities cited by him that on the law the rights of the first appellant under art 5 of the Federal Constitution includes the right to livelihood ie the right to earn a living to upkeep oneself. Therefore we share the view of the learned judicial commissioner that to further detain the books without any further action to ban them for their obnoxious contents that affronts the public or to keep them as material evidence by charging the first appellant in court for the alleged offence is to deny the first appellant his constitutional right to make a living under art 5 of the Federal Constitution from the sales of those books.

[64] With regard to the argument that the claim for damages was not pleaded, we observed that the learned judicial commissioner did not address this issue in his judgment. However we are of the view that this is not fatal in the circumstance. We noted that the appellants had, in their statement of claim, included an omnibus prayer for 'such relief as the court deems fit'. The law reports are replete with cases which deliberated and interpreted on this form of prayer and had decided that this form of prayer is not mere ornamental to grace the pages of a claimant's statement of claim.

(see *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160 (FC) and *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42 at p 55 (CA). Pursuant to this prayer the court may, if the facts and circumstances of the case warrant,

make an appropriate order to grant relief though not pleaded but would do justice between the parties. This case is one of those cases.

[65] For the foregoing reasons we unanimously find that there is no merit in this cross-appeal by the respondents.

[66] The final result therefore we unanimously dismiss both the appeal by the appellants and the cross-appeal by the respondents. Accordingly we hereby affirm the order of the High Court. We are minded in the circumstance to make an order that each party pays its own cost.

Appeal and cross-appeal dismissed.

Reported by Kanesh Sundrum